APPENDIX F

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY

DOCKET NO.: ESX-L-016044-90

Civil Action

UMC/STAMFORD, INC. UNIDYNAMICS CORP., et al.,
Plaintiffs,

v.

ALLIANZ UNDERWRITERS INSURANCE CO., et al.,
Defendants.

FILED
March 16, 1994
JULIO M. FUENTES
J.S.C.

ORDER REGARDING CERTAIN RULINGS OF FEB. 24, 1994

THESE MATTERS having been opened to the Court by attorneys for various insurance carrier defendants, in the presence of counsel for plaintiffs, Lowenstein, Sandler, Kohl, Fisher & Boylan, A Professional Corporation, and by attorneys for plaintiffs, in the presence of counsel for defendants, for various orders, and the Court having considered the briefs, affidavits and oral arguments of counsel and good cause appearing;

IT IS on this 16th day of March, 1994;

ORDERED that:

1. Plaintiffs' request to amend the complaint to add two additional policies to this matter be and is hereby DENIED.

2. Certain defendants' motions for summary judgment on the basis that there is no evidence of an occurrence during the policy periods be and are hereby DENIED.

3. Certain defendants' motions for summary judgment on the basis of the "pollution exclusion" clause be and are hereby DENIED.

4. The ruling of *Morton Int'l v. General Accident Ins. Co.*, 134 N.J. 1 (1993), shall be applied with regard to all issues regarding the "pollution exclusion" clause.

ORDERED that a copy of this Order shall be served upon all counsel of record within seven days of receipt.

/s/ Hon. Julio M. Fuentes
Hon. Julio M. Fuentes, J.S.C.

SUPERIOR COURT OF NEW JERSEY
ESSEX COUNTY, CIVIL PART

DOCKET NO. ESX-L-16044-90

UMC/STAMFORD, INC.,

Plaintiff,

vs.

ALLIANZ UNDERWRITERS INSURANCE COMPANY,

Defendant.

Place: Essex County Courthouse
M. L. King Blvd.
Newark, New Jersey 07102

Date: February 24, 1994

TRANSCRIPT OF MOTION

BEFORE:

HONORABLE JULIO FUENTES, J.S.C.

TRANSCRIPT ORDERED BY:

ARTHUR H. SAIEWITZ, ESQ., (Lowenstein, Sandler, Kohl, Fisher & Boylan, 65 Livingston Ave., Roseland, New Jersey 07068)

ATTORNEYS APPEARING:

MICHAEL DORE, ESQ., (Lowenstein, Sandler, et al.)
ARTHUR SAIEWITZ, ESQ. (Lowenstein, Sandler, et al.)

MARION HURTZ, ESQ., (Sheft & Sheft), for Republic
NINA LYNN CAROSELLI, ESQ., (Morgan, Melhuish, et al.) for Home

TIMOTHY SAEF, ESQ., (Morgan, Melhuish, et al.) for Home
ELIZABETH DE CRISTOFARA, ESQ. for Continental
SUSAN BERNARD, ESQ. for Continental
JUSTIN KEAN, ESQ. for Continental
MARYANN DAMATO, ESQ., (Mendes & Mount) for London Market
BRUCE A. TRITSCH, ESQ., (Feinberg & Tritsch) for Allstate
VINCENT SICALLELLA, ESQ., (Gleason, McGuire, et al.)-Allstate
ROBERT WALSH, ESQ., (Siff Rosen) for Hartford, et al.
LEONARD SEAMAN, ESQ., (Garity, Brown, et al.) for Utica
JEFFREY WALDER, ESQ., (Walder, Sondak, et al.) for Ultra

* * * *

THE COURT: Okay. Thank you all. We have to move on, I've got 4:00 o'clock and if I'm going to decide this I have to do it now because otherwise we have to come back another day.

After considering the papers submitted and the respective oral arguments and the legal authorities that I've reviewed, it is my determination that the pollution exclusion clause in the various policies subject to this lawsuit will be construed in accordance with the decision in the New Jersey Supreme Court case of *Morton vs. General Accident* which is cited at 134 NJ 1.

Certainly, summary judgment should be granted with caution. Caution is especially warranted where the issue involves important public policy considerations. And the record is a meager record. In *Morton* the Supreme Court of New Jersey stated, and I quote:

"We construe and give effect to the standard pollution exclusion clause only to the extent that shall preclude coverage for pollution caused—property damage caused by an

occurrence if the insured intentionally discharged, disbursed, released or caused the escape of a known pollutant". This is *Morton* at page 31.

The Supreme Court so limited the pollution exclusion clause in insurance policies because it found that the insurance industry had grossly mislead New Jersey regulatory agencies and regulatory agencies in other states. The New Jersey Supreme Court concluded that to enforce the standard pollution exclusion clause, as written, would contravene the state's public policy requiring regulatory approval of standard industry wide policy forums to assure fairness in rates and in policy content and would condone the industry's misrepresentation to regulators in New Jersey and other states concerning the effect of the clause.

I'm citing *Morton* at page 30:

"New Jersey will not apply the law of other states if it will conflict with important public policies in New Jersey".

Here the plaintiff is doing business in New Jersey, seeks recovery with respect to the matter covered by this motion for liability imposed upon it and its subsidiaries. The insurance carriers attempt to avoid coverage by relying upon a clause in the policy which the New Jersey Supreme Court has said resulted from deliberate misleading and wrongful conduct by the insurance industry.

The Supreme Court characterizes that conduct as not only deliberately misleading, but coming perilously close to deception.

In view of the strong language in the Supreme Court opinion in *Morton* concerning the improper conduct of insurance industries, it is not conceivable to me that the New Jersey Supreme Court would construe the meaning of the pollution exclusion clause in this case in such a way as to permit the carriers to avoid coverage. Any other

interpretation would be seriously in conflict with important public policy of New Jersey as stated in Morton.

Under those circumstances, the pollution exclusion clause, no matter where the site, must, in the New Jersey action, especially where the plaintiff does business in New Jersey, be construed and applied in accordance with the decision of the Supreme Court in *Morton*.

In other words, the insurance companies here in this case, as in *Morton*, are estopped as a matter of equity and fairness from relying on the literal language of the pollution exclusion clause.

Accordingly, my decision is to deny all motions seeking dismissal of plaintiffs cause of action based on the pollution exclusion clause.

There are other issues related to that same clause concerning a sudden event and a happening and so forth, and these are issues that must be decided in the context of factual presentations and may be raised again at the conclusion of plaintiffs case.

That's my decision with regard to this issue. I have some other issues and we do have to stop, that must be addressed, justiciability, choice of law, I've heard a considerable amount of argument. I think many of you have included those arguments on the pollution exclusion issue. Owned property, late disclosure of settlement and there's also a motion, I think it's by Home Insurance and Continental, to be dismissed as to certain sites.

* * * *

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY

DOCKET NO: W-56581-88

Civil Action

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Plaintiff,

-against-

AETNA CASUALTY AND SURETY COMPANY, et al.,
Defendants.

FILED
DEC 09 1993
BURRELL IVES HUMPHREYS
A.J.S.C.

ORDER DENYING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFF'S CROSS-MOTION FOR DETERMINATION OF APPLICABLE LAW

This matter having been brought before the Court by the motions and cross-motions for summary judgment by defendants Aetna Casualty & Surety Co., Plaisted and Companies, United States Fire Insurance Co., The North River Insurance Co., International Insurance Co., Home Insurance Co. and City Insurance Co., and by the cross-motion of plaintiff American Telephone & Telegraph Company ("AT&T") for a determination of applicable law, and the Court having considered the written submissions of all parties, and having heard oral argument by counsel, and

for the reasons set forth in this Court's Oral Opinion on November 19, 1993;

IT IS on this 8 day of Dec., 1993

ORDERED, that the motions and cross-motions for summary judgment by defendants Aetna Casualty & Surety Co., Plaisted and Companies, United States Fire Insurance Co., The North River Insurance Co., International Insurance Co., Home Insurance Co., and City Insurance Co. be and hereby are denied; and it is further

ORDERED, that plaintiff AT&T's cross-motion for a determination of applicable law be and hereby is granted, to the effect that the "pollution exclusion" clauses contained in the various policies of insurance at issue in this case shall be interpreted in accordance with the New Jersey Supreme Court's Opinion in *Morton International, Inc. v. General Accident Insurance Company of America*, 134 N.J. 1 (1993), as more fully described in this Court's Oral Opinion on November 13, 1993; and it is further

ORDERED, that a copy of the within Order shall be served upon all counsel of record within 3 days.

/s/ Hon. Burrell Ives Humphreys
Hon. Burrell Ives Humphreys, A.J.S.C.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, ESSEX COUNTY

DOCKET NO. W-56581-88

AMERICAN TELEPHONE and TELEGRAPH COMPANY,
Plaintiff,

vs.

AETNA CASUALTY & SURETY COMPANY, et al.,
Defendants.

Place: Essex County Courthouse
Newark, New Jersey 07102

Date: November 19, 1993

TRANSCRIPT OF MOTION

BEFORE:

HON. BURRELL IVES HUMPHREYS, J.S.C.

TRANSCRIPT ORDERED BY:

MR. JOHN S. HARVEY (Crummy, DelDeo, Dolan, Griffinger & Vecchione)

APPEARANCES:

MICHAEL D. LOPRETE, ESQ. (Crummy, DelDso, Dolan, Griffinger & Vecchione)
SETH D. SCHAFFLER, ESQ.
Attorneys for Plaintiff

ALAN WHITE, ESQ. (Harwood Lloyd)
BILL ELLISON, ESQ. (Loco, Bissell & Brook)

WILLIAM B. MC GUIRE, ESQ. (Tompkins, McGuire & Wachenfeld)
JOSEPH DE DONATO, ESQ. (Morgan, Melbuish, Monaghan)
LAURENCE MC HEFFREY, ESQ.
Attorneys for Defendants

* * * *

THE COURT: All right. Anything further? The Court's decision is as follows. This is a suit for a declaratory judgment and breach of contract by plaintiff against its insurance companies for liabilities plaintiff is incurring, or has incurred, in connection with various environmental claims. Approximately 24 waste disposal sites throughout the United States are involved. The defendants have counter-claimed, asserting that coverage is not available under their insurance policies.

Defendant Aetna moves for summary judgment with respect to one site, the Halleva land fill, located in Pennsylvania. Aetna contends that Western Electric, a subsidiary of plaintiff, shipped hazardous waste for disposal at this land fill from two generating facilities, also located in Pennsylvania. Other defendants join in the motion.

Aetna contends that Pennsylvania law should govern the construction of the pollution exclusion clause with respect to the Pennsylvania Halleva site. Aetna also contends there is no coverage because the contamination predated the Aetna policies and that the action should be dismissed as untimely as against Aetna because it is unlikely, according to Aetna, that plaintiff's liability will be large enough to be covered by Aetna, which is an excess insurance carrier.

Plaintiff cross-moves for a ruling that the pollution exclusion clauses of the insurance policies in this case are to be construed in accordance with the recent decision of the New Jersey Supreme Court in *Morton* vs. *General Accident*, 134 NJ 1, Supreme Court of New Jersey 1993.

After due consideration of the papers submitted, oral argument and the legal authorities, the Court denies the defendant's motion for summary judgment. The pollution exclusion clause will be construed in accordance with the decision of the New Jersey Supreme Court in *Morton*, supra. The Court's reasons are as follows.

I.

Summary judgment is designed to provide a prompt, business-like and inexpensive method of disposing of any cause which a discriminating search of the merits and the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion, clearly show not to present any genuine issue of material fact requiring disposition at a trial. See *Judson* vs. *Peoples Bank and Trust Company of Westfield,* 17 NJ 67, 74 Supreme Court of New Jersey 1954. Summary judgment should be granted with caution. Caution is especially warranted where the issue involves important public policy considerations and the record is meager. See *Jackson* vs. *Muhlenberg Hospital,* 53 NJ 138, Supreme Court of New Jersey 1969, *Devlin* vs. *Burgint* (phonetic), 18 NJ 148, 154, Supreme Court of New Jersey 1955.

A movant for summary judgment was exclude [sic] any reasonable doubt as to the existence of any genuine issue of material fact. See *Judson* at page 74. All inferences of doubt are drawn against the movant in favor of the opponent of the motion. The papers supporting the motion are closely scrutinized and the opposing papers indulgently treated. Ibid.

Issues of credibility are ordinarily for the trier of fact, a Court should not function as a trier of fact in determining a motion for summary judgment. *Judson* at page 75.

Where subjective factors, such as fraud, intent or bad faith are material, then a conclusion from the papers alone that palpably there exists no genuine issue of fact will ordinarily be very difficult to sustain. *Judson* at 76.

II.

Under this Court's prior ruling, the law of Pennsylvania would be applied to construction of insurance policies re-

garding the Pennsylvania site. See this Court's opinion, July 2nd, and the Court's order of August 9th. Aetna argues that under Pennsylvania law, the pollution exclusion clause will exclude coverage under the facts of this case.

Subsequent to this Court's decision, the Supreme Court of New Jersey decided the *Morton* case and held, quote, accordingly, we construe and give effect so the standard pollution exclusion clause only to the extent that shall preclude coverage for pollution caused property damage caused by an occurrence if the insured intentionally discharged, dispersed, released or caused the escape of a known pollutant. *Morton* at page 31. The Supreme Court so limited the pollution exclusion clause in insurance policies because it found that the insurance industry had grossly misled New Jersey regulatory agencies and regulatory agencies in other states. The New Jersey Supreme Court concluded that to enforce the standard pollution exclusion clause, as written, "would contravene this State's public policy requiring regulatory approval of standard industry-wide policy forms to assure fairness in rates and policy content and would condone the industry's misrepresentation to regulators in New Jersey and other states concerning the effect of the clause." *Morton* at 30.

New Jersey will not apply the law of other states if it conflicts with important public policies in New Jersey. Here, plaintiff is a New Jersey domiciliary seeking recovery, with respect to the matter covered by this motion, for liability imposed upon its subsidiary. The insurance carriers attempt to avoid coverage by relying upon a clause in the policy which the New Jersey Supreme Court has said resulted from deliberate misleading and wrongful conduct by the insurance industry. The Supreme Court characterized that conduct as not only deliberately misleading, but coming "perilously close to deception."

In view of the strong language in the Supreme Court opinion in *Morton* concerning the improper conduct of the insurance industries, it would be in congress, indeed inconceivable, to conclude that the New Jersey Supreme Court would construe the meaning of the pollution exclusion clause in this case in such a way as to permit the carrier to avoid coverage. Put another way, construction of the clause in the manner sought by Aetna, assuming, for the sake of argument, that Pennsylvania would so construe it, would be seriously in conflict with important public policy in New Jersey. Under those circumstances, the pollution exclusion clause, no matter where the site, must in a New Jersey action, especially where the plaintiff is a New Jersey company, domiciliary, be construed and applied in accordance with the decision of the Supreme Court in *Morton.* Put yet another way, the insurance companies here, as in *Morton,* are estopped as a matter of equity and fairness from relying on the literal language of the pollution exclusion clause. See page 75 of *Morton* holding that estoppel would apply.

Aetna also contends that the facts here show that with respect to the Halleva's Pennsylvania site, the insured did intentionally dispose of hazardous products and, therefore, even under *Morton,* coverage is barred. Plaintiff disagrees. Both sides have filed voluminous papers supporting their view of the facts. This issue is particularly fact sensitive. In remediation cases, the insured's responsibility "vary significantly in their degree of culpability for harm caused by pollutant discharges." *Morton* at page 86. Consequently, the Court said in *Morton,* an intent to injure is not presumed simply by the knowing discharge of pollutants. What is required, the *Morton* said, is a "case by case analysis" in order to determine in the context of all the available evidence whether exceptional circumstances exist and objectively establish the insured's intent to injure. Those circumstances would include, the Court in *Morton* said, the duration of the discharges, whether the discharges oc-

curred intentionally, negligently, innocently, the quality of the insured's knowledge, harmful propensities of the pollutants, whether regulatory authorities attempted to discourage or prevent the insured's conduct, and the existence of subjective knowledge concerning the possibility or likelihood of harm. See *Morton* at pages 86 and 87. Determination of such broad and general fact questions can best be determined in the conduct—in the context of a trial, not on a motion for summary judgment. Defendants may have presented a strong case with respect to the Halleva site, but that, standing alone, does not mean a motion for summary judgment should be granted. See *Rivola* (phonetic) vs. *American Casualty Co.*, 39 NJ 490, page 501, Supreme Court of New Jersey 1963.

That is withdrawn without prejudice, its known risk ground, to the extent not withdrawn by other movants, this is also a fact sensitive issues and fact issues are clearly present.

Plaintiff contends that its liability may reach Aetna's—may not—plaintiff contends that its liability may reach Aetna's excess coverage. Under those circumstances, a justiciable controversy exists and a declaratory judgment is proper. See NJSA 2A:16-52 and *T&E Industries* vs. *Safety Light Corp.*, 123 NJ 371, 397, Supreme Court of New Jersey 1991.

For the foregoing reasons, the Court rules as aforesaid. Counsel for the plaintiff, please submit a form of order?

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